

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE:  
BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL NO. 2406)**

**Master File No. 2:13-CV-20000-RDP**

**This Document Relates to  
Provider Track Cases**

**PROVIDER PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY JUDGMENT ON  
DEFENDANT'S CLAIM TO COMMON-LAW TRADEMARK RIGHTS**

**Filed Under Seal Pursuant to Qualified Protective Order (Dkt. 550)  
and the Order Regarding Revised Sealing Procedures (Dkt. 758)**

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In this litigation, the Blues have repeatedly claimed that they “independently acquired common-law trademark rights” to exclude other plans from their “service areas.” Doc. No. 1353 (Defendants’ Motion for Summary Judgment) at 1. But they never had such rights. This is because the Blues have admitted that the first plans to use the Blue Cross and Blue Shield marks allowed nearby plans to use those marks without controlling the quality of the services the plans provided. This is known as “naked licensing” at common law, and it resulted in the abandonment of rights in the marks. Therefore, shortly after the marks were created, no Blue plan had the common-law right to exclude others from using those marks wherever they pleased. Even if the marks were not abandoned, the Blues’ own account of their history and their admissions in this litigation show that many Blue plans, including the Alabama plan, used the marks under the control of others. The common law treated one who used a trademark under the control of another as a licensee, whose rights to use the mark extended no farther than the license and terminated with the license. Therefore, the Court should enter partial summary judgment that the Blues abandoned their marks, or in the alternative, that only the original users of the Blue Marks, the St. Paul plan and the Buffalo plan, independently acquired common-law trademark rights, with the rest of the Blues being licensees at most.

#### **UNDISPUTED RELEVANT MATERIAL FACTS**

1. “In 1934, the St. Paul hospital Plan began using a blue cross symbol. (Docs. # 1349 at 11; 1431 at 15; 1435 at 11). The first use of the Blue Shield Service Mark was by the Western New York Plan, located in Buffalo, New York, in 1939. (Doc. #1350-35 at 2). Other Plans began using these same symbols as well (Id.; Docs. # 1349 at 11; 1431 at 15; 1435 at 12).” Doc. No. 2063 at 5.

2. “Both the St. Paul and Buffalo Plans acquiesced in, and even encouraged, other Plans to use the Cross and Shield Marks during this time period. (Docs. #1349 at 11; 1431 at 15;

1435 at 12). The St. Paul Plan allowed Plans in every bordering state (North Dakota, South Dakota, Wisconsin, and Iowa) to use the Blue Cross Marks. (Doc. # 1353-4 at 29-30). The Buffalo Plan allowed Plans in Syracuse and Rochester (locations close to Buffalo) as well as other Plans in New York to use the Blue Shield Mark. (Doc. #353-5 at 38).” Doc. No. 2063 at 5–6.

3. The St. Paul plan never controlled the quality of services provided by other users of the Blue Cross Marks. Doc. # 1350-28 (Rotunno Tr.) at 42:20–43:1. The Buffalo plan never controlled the quality of services provider by other users of the Blue Shield Marks. *Id.* at 124:18–125:1.

4. “By 1939, the American Hospital Association (‘AHA’) issued ‘Standards for Non-Profit Hospital Service Plans.’ (Doc. # 1350-13). Under these standards, approval by the AHA’s Commission on Hospital Service gave a Plan ‘permission to identify the plan by using the seal of the American Hospital Association superimposed upon a blue cross.’ (Docs. # 1350-13 at 5–6; Doc. # 1353-19 at 6).” Doc. No. 2063 at 3.

5. By the beginning of 1938, which is before the AHA allowed approved plans to use the Blue Cross Marks, there were thirty-eight plans using those marks. Doc. No. 1353-4 at 23.

6. “The American Medical Association (‘AMA’) also approved the concept of prepayment plans, and promulgated approval standards for such plans. (Docs. # 1349 at 12; 1431 at 15; 1435 at 13). The AMA set up the Associated Medical Care Plans (‘AMCP’) ‘to administer the approval program’ for Blue Shield Plans. (Doc. # 1353-7 at 84-85). Medical care plans that met the AMA/AMCP’s standards likewise could use a blue shield emblazoned with a caduceus. (Docs. # 1353-20 at 16; 1431 at 15; 1435 at 13).” Doc. No. 2063 at 3.

7. By the beginning of 1946, the year when the AMA announced standards for medical service plans, thirty-two plans were using the Blue Shield Marks. Doc. No. 1353-5 at 35.

8. “On December 13, 1947, the Blue Shield Medical Care Plans (the ‘National

Organization’) formally adopted the Shield Mark as the official service mark for the Organization. (Docs. # 1350-35 at 2; 1353-48). Thereafter, in 1950, Blue Shield Medical Care Plans applied for federal registration of the Blue Shield Marks. (Docs. # 1353-46; Doc. # 1353-48).” Doc. No. 2063 at 6.

9. “The Blue Shield Medical Care Plans had permission from the first user, the Buffalo Plan, to apply for registration. (Docs. # 1353-101; 1436-11 at 135-40.)” Doc. No. 2063 at 6.

10. “[O]n December 1, 1952, the users of the Shield Mark entered into an Agreement (the ‘1952 Agreement’) relating to the Collective Service Mark ‘Blue Shield.’ (*Id.*; Doc. # 1352-227 at 24). Although the Plans ‘recogni[z]ed that the words “Blue Shield” and the identifying symbol *are* the property of the National Organization,’ the 1952 Agreement is silent as to the assignment of any rights in the Shield Mark to the National Organization. (Doc. # 1353-48 at 3) (emphasis added). It is also silent as to the creation and/or existence of any exclusive service areas. (*Id.*). Under the 1952 Agreement, the Blue Shield Plans were granted ‘permission’ to use the Blue Shield Marks in interstate and foreign commerce. (*Id.*).” Doc. No. 2063 at 6.

11. “Previously, in 1947 and 1948, the AHA applied for and received federal registrations for the Blue Cross Marks, stating that it had adopted and was using the Marks. (Docs. # 1350-40, 1530-41, and 1530-42). However, at that time, the AHA did not have an assignment from the first user, the St. Paul Plan, and did not receive a formal assignment of the rights to the Blue Cross Mark until 1954. (Doc. # 1436-11 at 56-57).” Doc. No. 2063 at 7.

12. Hospital Service Corporation of Alabama, the predecessor to Blue Cross Blue Shield of Alabama, first used the Blue Cross mark in 1939, after the American Hospital Association had formalized its requirements for hospital plans. It first used the Blue Shield mark in 1947, after the American Medical Association approved standards for medical plans to use the Blue Shield. Doc. No. 2728 at 3.

## ARGUMENT

### I. The Original Owners of the Blue Marks Abandoned the Marks Through “Naked Licensing.”

In a 1987 draft White Paper, the Blues recognized that “[t]he law imposes a duty on the owner of the marks to control and maintain the quality of services rendered under the marks.” Doc. No. 1352-227 at 55. The Blues were correct. Allowing someone else to use one’s mark without controlling the quality of services provided is known as “naked licensing.” “When a service mark owner engages in naked licensing, without any control over the quality of the services rendered by the licensee, such a practice is inherently deceptive and constitutes abandonment of any rights to the service mark by the licensor.” *CNA Fin. Corp. v. Brown*, 922 F. Supp. 567, 574 (M.D. Fla. 1996), *aff’d*, 162 F.3d 1334 (11th Cir. 1998); *see also* Doc. No. 2063 at 6 n.4 (the Blues’ draft White Paper “recognized that unlicensed and unauthorized use of trademarks can result in abandonment”). “[A] defendant who successfully shows that a trademark plaintiff has abandoned a mark is free to use the mark without liability to the plaintiff.” *Cumulus Media, Inc. v. Clear Channel Commc’ns, Inc.*, 304 F.3d 1167, 1173 (11th Cir. 2002).

Starting in 1934, the St. Paul Blue Cross plan allowed other plans to use the Blue Cross Marks without controlling the quality of their services. Facts 1–3. By the beginning of 1938, which is before the AHA allowed approved plans to use the Blue Cross Marks, there were thirty-eight such plans. Facts 4–5. Starting in 1939, the Buffalo Blue Shield plan allowed other plans to use the Blue Shield Marks without controlling the quality of their services. Facts 1–3. By the beginning of 1946, when the AMA announced standards for medical service plans, thirty-two plans were using the Blue Shield Marks. Facts 6–7. This is a textbook case of naked licensing, and thus of trademark abandonment.

The Blues may respond that the AHA and AMA (and their successor organizations) eventually controlled the quality of the services marketed under the Blue Cross and Blue Shield

Marks. There are several problems with this argument. First, by the time the AHA began to authorize the use of a blue cross in 1939, and the AMA began to authorize the use of a blue shield in 1946, the trademarks had already been abandoned. Belatedly imposing quality control could not resurrect them. Second, quality control is the responsibility of the mark's "owner." Doc. No. 1352-227 at 55 (Blues' White Paper); *CNA Fin. Corp.*, 922 F. Supp. at 574. The St. Paul plan was the owner of the Blue Cross Marks, and it did not assign them to the AHA until 1954. Facts 10–11. The AMA apparently never owned the Blue Shield Marks, and it is unclear whether the Buffalo plan ever assigned those marks to Blue Shield Medical Care Plans, which registered them in 1950. Facts 8–9. Therefore, the owners of the marks failed to exercise quality control for many years beyond the introduction of the AHA and AMA standards. Third, even if this mismatch in ownership were not a fatal problem, the exercise of quality control over the Blue plans would simply demonstrate that they were vertical licensees, not the first users to whom the common law granted trademark rights. *See* Section II.

The Blues' premise—that dozens of companies can independently develop rights to the same marks—is antithetical to the purpose of trademarks, which is "to indicate a single source of origin of the articles to which it refers." *Thomas Pride Mills, Inc. v. Monsanto Co.*, 155 U.S.P.Q. 205, 1967 WL 7489, at \*4 (N.D. Ga. June 14, 1967). At common law, valid trademarks simply do not develop the way the Blues' did, with the owner encouraging others to use the mark without quality control. It speaks volumes that the Blues' starring authority is *VMG Enterprises, Inc. v. F. Quesada & Franco, Inc.*, 788 F. Supp. 648 (D.P.R. 1992), a case that involved two companies, one in Washington State and one in Puerto Rico, that had both been using the same mark, apparently without each other's knowledge. Under the Lanham Act, they were thus permitted to enter into a "concurrent use" agreement, which is available to "two or more entities [that] independently and unknowingly develop rights to use identical trademarks on the same or similar goods." *Id.* at 654



(emphasis added). A concurrent use agreement under the Lanham Act reflects the common-law principle that if a geographically remote junior user of a mark innocently adopted and used the mark without any knowledge of the senior use, the junior user may establish concurrent common-law rights in its geographically remote territory. *Id.*; *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 103–04 (1918).

The Blues, however, admit that the earliest Blue plans began using the Blue Cross and Blue Shield Marks with knowledge of the St. Paul and Buffalo plans’ use, and they were not geographically remote. Blue Cross plans sprang up in every state bordering Minnesota, and Blue Shield plans sprang up in areas of New York close to Buffalo. Fact 2. Therefore, the Blues would not have qualified for concurrent use under the common law or the Lanham Act. *Rectanus*, 248 at 100 (junior use must be “innocent” (i.e., without knowledge) and “remote”); *Pike v. Ruby Foo’s Den, Inc., of Md.*, 232 F.2d 683, 686 (D.C. Cir. 1956) (“The Federal cases are virtually unanimous against a knowing junior user.”); 3 McCarthy on Trademarks and Unfair Competition § 20:84 (5th ed.) (“A [Lanham Act] § 2(d) ‘lawful use’ sufficient for concurrent use cannot be one made with actual or constructive notice of the senior user’s rights.”).<sup>1</sup>

Because the earliest Blue plans knowingly used the senior users’ marks with permission and without quality control, the Blue Marks were abandoned before anyone imposed standards for their use. While the Providers are not asking the Court to cancel the Blues’ federal registrations, it is abundantly clear that at common law, no Blue plan other than the St. Paul and Buffalo plan ever

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<sup>1</sup> Arguably, the Fifth Circuit created an exception to this rule when the junior user did not intend to benefit from the senior user’s goodwill or reputation, and when there was no likelihood of confusion as to source. *El Chico, Inc. v. El Chico Cafe*, 214 F.2d 721, 726 (5th Cir. 1956). That exception would not apply here, as the entire point of using the Blue Cross and Blue Shield Marks was to benefit from the goodwill associated with them, and a likelihood of confusion as to source is obvious when multiple companies sell the same product using the same names and marks in close proximity to each other. Moreover, Fifth Circuit law would not have applied to the earliest use of the Blue Cross and Blue Shield Marks, which took place in the Second, Seventh, and Eighth Circuits.

developed a common-law right that would allow it to exclude others from using the Blue Marks in its territory of use, and that the St. Paul and Buffalo plans promptly abandoned those rights through naked licensing.

**II. In the Alternative, All But Two of the Blues Were No More Than Vertical Licensees Without Any “Independently Acquired Common-Law Trademark Rights.”**

A fundamental principle of trademark law is that there can only be a single owner of a mark. “The primary functions of a trademark are to indicate a single source of origin of the articles to which it refers and to offer assurance to ultimate consumers that articles so labeled will conform to quality standards established and, when licensed to others, controlled by the trademark proprietor.” *Thomas Pride Mills*, 1967 WL 7489, at \*4 (cited in McCarthy on Trademarks and Unfair Competition § 3:10 (4th ed. 2001)). Common-law trademark rights are established by being the first user of a mark in commerce. *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 100 (1918); *Hanover Milling Co. v. Metcalf*, 240 U.S. 403, 413-14 (1915). At one time, as the first user, the St. Paul plan owned common-law rights in the Blue Cross Marks within its territory of use. Likewise, the Buffalo plan at one time owned common-law rights in the Blue Shield Marks within its territory of use.

At common law in the 1930s and 1940s, an entity’s use of a trademark under conditions controlled by the trademark’s owner was considered a license. Doc. No. 1431-27, 1 Harry D. Nims, *The Law of Unfair Competition and Trade-Marks*, at 128 (4th ed. 1947); see Doc. No. 1431-28, 2 Rudolf Callmann, *The Law of Unfair Competition and Trade-Marks*, at 1070–71 (1st ed. 1945). According to the Blues, the use of the Blue Cross Marks was subject to conditions established by the AHA by 1939, and the use of the Blue Shield Marks was subject to conditions established by the AMA by 1946. Doc. No. 2728 at 5. This is consistent with the testimony of the Association’s corporate representative, who admitted that before entering into the 1952 Blue

Shield agreement and the 1954 Blue Cross agreement, Blue Cross and Blue Shield plans operated pursuant to a license. Doc. No. 1350-28 at 135:14–140:10. Therefore, the Blue plans were never “senior users” of the Blue marks, entitled to the protection awarded to someone who uses a mark for the first time. Instead, they had the rights of a licensee—the right to use a mark owned by another under certain conditions. They did not have an “independent” right to the Blue Cross or Blue Shield Marks. Doc. No. 1431-27, Nims at 129 (a licensee loses its right to use the mark when its contract ends); Doc. No. 1431-28, Callmann at 1067 (“The licensee only acquires the right to a limited use of the trade-mark, for the title to and reversionary interest in that use remain with the owner.”).

The last time this issue came up, the Blues admitted that at least some plans were mere licensees, claiming that exclusive service areas “arose from common-law trademark rights *or vertical licenses from the AHA and AMA where there was no prior use.*” Doc. No. 1551 (Defendants’ MSJ Reply) at 2 (emphasis added). Hospital Service Corporation of Alabama, the predecessor of Blue Cross Blue Shield of Alabama, was one of these vertical licensees. The Blues have asserted that Hospital Service Corporation of Alabama first used the Blue Cross Mark after the AHA had formalized its requirements for hospital plans, and it first used the Blue Shield mark after the AMA approved its standards for medical plans. Fact 12.

Therefore, the Blues, other than the St. Paul plan and the Buffalo plan, were *at most* vertical licensees, with no “independently acquired common-law trademark rights.”

### CONCLUSION

The Court should grant partial summary judgment as follows: “The Blues abandoned their common-law rights in the Blue Marks prior to the execution of the 1952 Blue Shield agreement and the 1954 Blue Cross agreement.” In the alternative, the Court should hold, “Only the St. Paul plan and the Buffalo plan ever independently acquired common-law rights in the Blue Marks.

Based on the summary judgment record, all other Blue plans were at most vertical licensees prior to the execution of the 1952 Blue Shield agreement and the 1954 Blue Cross agreement.”

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Respectfully submitted

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